The Evolved Appellate Brief

by Larry A. Klein

This article is the result of a suggestion from one of my partners who thought that, because I recently served as a state court appellate judge, I had read far more poor-to-excellent briefs than most practicing lawyers. He is probably right, as my judicial experience was in highly litigious South Florida and included all civil and most criminal appeals from trial courts of general jurisdiction. The briefs ran the gamut from those written by inexperienced practitioners in routine cases to those written by nationally known counsel, sometimes assisted by law professors, in high-stakes cases. It was not always the most prominent counsel who made the best impression.

What most lawyers who came before us did not realize—myself included, before going on the bench—is that appellate judges do not have the luxury of time to be able to appreciate the finer points of a literary brief. Appellate judges have very large caseloads and hear a dozen or two oral arguments in one week. As a judge, I would first read a bench memo prepared by a law clerk, about 10 to 50 pages, analyzing and summarizing the briefs. By the time I got to the briefs themselves, I had an overview that enabled me to spend more time on some parts of the briefs and less on other parts.

Candor, brevity, and clarity get the best results, so avoid the temptation to fall in love with your own writing. When I drafted my first brief after leaving the bench, and it was finally complete, I realized that I had spent as much time polishing the language of my brief as an aspiring writer would spend polishing a short story before submitting it to *The New Yorker*. All of the rewriting, beyond a certain point, did not make the facts or arguments more clear or persuasive, and I wound up not charging the client for what I realized was excessive rewriting. Judges at all levels simply do not have the time to appreciate the finer points of your writing ability. Simplicity and brevity are much more effective.

Remember that you are not a member of the audience for your brief, and neither is your client. Counsel these days often seem more concerned with impressing the client—and themselves—than the court. In my first year back in practice, I came across the following example:

> The trial contained so many legal errors and so much fundamental unfairness as to make a rational jury verdict impossible. The rulings hijacked the jury's truth finding function. The court made bizarre rulings which dismantled the basic protection afforded litigants.

This was the first paragraph of a brief written by well-known appellate counsel, and his overblown rhetoric was not supported by the record. While his client no doubt found the result of the trial egregious, the errors alleged were no more bizarre than bifurcation, the admission of hearsay, and failure to direct a verdict. Most appellate judges reading this type of hyperbole would immediately assume the appellant cannot make its case on the merits.

To make matters worse, the appellate court in which this brief was filed was in the same city as the trial court. Some of the appellate judges came from the trial bench and could have been close friends of the trial judge. Appellate judges are already loathe to reverse their colleagues in the trial court. Insulting a well-meaning, even if incorrect, trial judge can only work against you.

Another example I came across in my first year back in practice was a brief by well-known appellate counsel, representing the appellee, which began with this paragraph:

> Appellant's brief is an egregious and repeated violation of the rule that appellant must state evidence in a light most

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favorable to the jury verdict. It describes a record which does not exist, ignores mountains of evidence to the contrary, and misrepresents that no such evidence exists.

The brief contained words like "false" or "failed to disclose" on almost every page, and seemed more concerned with personal attacks on counsel for the appellant than the merits. As it happened, the appellant's arguments had such little merit that the appellees should have gone right to the merits, correcting any omissions or misrepresentations without the accusations toward counsel. Fortunately for the appellees, additional counsel intervened, and the brief was rewritten before it was filed. Inflated personal attacks are offensive and draw the appellate judges' focus away from the real facts and issues.

Some younger, inexperienced lawyers are prone to slanting the facts or elevating rhetoric over clear, candid writing. If you are the partner responsible for converting that lawyer's draft into the final product, you must be sensitive to this. If the draft leaves out facts that are not favorable to your client, you must find the facts in the record and add them. The last thing you want is for a judge to first find out about these adverse facts in the appellee's brief. An honest presentation, which recognizes the weaknesses as well as the strengths of your case, is crucial for making a good first impression. Omissions can also damage your own professional reputation in general among the appellate judiciary, and credibility is everything. It is not unusual for one of the judges to comment to non-panel members at lunch that so and so cannot be trusted. Judges like gossip as much as the rest of us.

Remember that the facts are almost always as important as the law, and often more important than the law. Do not skimp on the facts, and, if you have to think about including a fact that is arguably irrelevant, err on the side of inclusion. Facts that add human interest, but are of no legal significance, can make a case more interesting. In addition, not all judges agree on the relevancy of certain facts to an issue. The more experience I gained as an appellate lawyer and judge, the more I recognized that what might seem to be chaff to me was wheat to a colleague I respected, or vice versa.

Assume, for example, a product liability case in which the plaintiff was rendered a quadriplegic and obtained a large jury verdict. The defendant appeals, arguing issues pertaining only to jury instructions on liability. Because the plaintiff's injuries are not legally relevant, the appellant defendant does not say anything about the plaintiff's injuries in its brief. Although it is true that the plaintiff's injuries are not relevant, this omission by the defendant results in the plaintiff's describing the injuries in great detail in the appellee's brief, including many pages detailing a day in the life of a quadriplegic.

As a former judge, I would not recommend what either counsel did in just such a case. If I were defense counsel, I might have stated something to the effect that the plaintiff became paralyzed as a result of the accident, and, although the verdict was $10 million, the amount was not being challenged on appeal (the court will want to know the amount of the judgment). On the other hand, when the plaintiff's counsel takes up too many pages on the injuries, and damages are not in issue, it will appear to the court that the plaintiff is seeking a result based on sympathy, not the facts and the law.

An introduction at the beginning of the statement of the case and facts, of no more than a few paragraphs, can assist the reader in understanding the facts that follow. Judges are trained to write opinions with what is known as a road-map paragraph at the beginning. The introduction can serve the same purpose in an initial brief, as well as in an appellee's brief. It is more efficient and effective to draft an introduction after the brief is almost in final form.

Even if your rules do not require it, state the issues before the facts, as well as in the argument section. Unless the judges know the issues before reading the facts, the importance of many facts will be lost on first reading. The issues must, for the same reasons, be specific, even if this requires several sentences to avoid awkwardness.

Assume, for example, the trial involved a plaintiff seeking to recover damages for fibromyalgia, a disease of unknown origin, as a result of a car crash. The plaintiff receives a jury verdict, but the trial court grants a new trial based on error in admitting testimony from a doctor linking the disease to the accident. The plaintiff appeals the order granting the new trial and might word the issue as follows:

> Under *Frye v. United States*, the trial court must determine whether an expert's opinion linking a disease to a cause is acceptable scientifically, or is inadmissible as junk science. In this case, the court ruled the testimony admissible a year before trial, and defendant failed to object to

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the testimony during trial. The failure to object was as a matter of law a waiver, and the court erred in granting a new trial based on error in admitting this evidence.

Most cases will warrant more than one issue on appeal, but be careful not to raise too many issues. Far more than 50 percent of cases are affirmed, which means that if you have even one meritorious issue as the appellant, you are very, very lucky. In a civil case, when you get beyond three or four, your best issue can get lost in the shuffle.

Raising numerous issues in criminal appeals is different from doing so in civil appeals because, if the appeal is affirmed, your client will then move for post-conviction relief alleging you were incompetent for failing to raise an issue. Post-conviction relief results in another hearing before a trial judge, and a second appeal raising the issues of the failure of counsel to raise issues in the original trial or first appeal. Accordingly, raising dubious issues on the direct appeal from the conviction can avoid the post-conviction proceeding. Because of this, the unwritten view in some appellate courts is that, in a direct criminal appeal, there is almost no such thing as a frivolous issue.

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Which issue do you put first, where you calculate an 80 percent chance of getting a new trial and a 20 percent chance of getting a directed verdict? The directed verdict, on which you have the 20 percent chance for reversal, is the best result: The case is over, and your client does not have to face a new trial. You must, however, put the issue with the best chance for reversal first, unless it is a minor issue such as the amount of costs awarded. To do otherwise is too risky because the judges may assume your strongest issue is your first issue, and this could draw the court's attention away from the issue with more merit.

The appellant must also explain early on how the error was preserved and, later on, how it was prejudicial. Appellate courts are, by statute, rule, or otherwise, bound not to reverse unless errors are preserved and prejudicial. Affirming for lack of preservation or harmlessness is the easy way for appellate courts to resolve what otherwise could be a difficult issue. There are more arguments between judges in conference about whether an error is prejudicial than you would think.

Always include the standard of review, and be sure it is the correct one for your case. It bears more thought than many counsel—or judges, for that matter—give it. For example, it can be inferred from many opinions that the standard for all evidentiary issues is abuse of discretion, which is, of course, the standard most deferential to the trial court and unfavorable to the appellant. Research will often clarify that some hearsay evidence, such as the written statement of an eye witness who is not available, is inadmissible as a matter of law so that the standard of review is legal error. On the other hand, the admissibility of another type of hearsay, such as a spontaneous utterance or dying declaration, which involves the weighing of facts by the trial judge, may involve the exercise of discretion. Published opinions often do not recognize this distinction. Similarly, the omission of a jury instruction can be fatal as a matter of law or discretionary, depending on the subject matter, but some opinions do not recognize the distinction and simply characterize it as abuse of discretion. There is generally no discretion for a court not to instruct on a theory of the case, such as comparative negligence, or a lesser included offense. This would be legal error.

The rules in many courts require a summary of argument, which is most helpful to judges. The tendency of some brief writers, however, is to cram too much detail into the summary. It should not require more than a few pages to paint the big picture. Remember, it is an overview, and telling the reader about a minor additional reason why a ruling was an error may be more of a distraction than you want in the summary. Skip drafting the summary of argument until after the full argument section is complete—the summary will take less time and be more accurate that way.

If you are the appellant's counsel, write the initial brief as if it is your only shot. Include all of your legal arguments, and anticipate and deflect your opponent's strong points and cases in your initial brief. Never save anything for the appellant's reply brief unless you are willing to have it overlooked or risk the appellee moving to strike or for leave to respond. Reply briefs do not get the same scrutiny as the preceding briefs, and sandbagging makes you look sneaky or incompetent. If you do happen to discover a new argument, consider including it, but acknowledge that it was not in your main brief. Most judges want to be aware of all legitimate arguments, and the court can solve the problem of a new argument by allowing the appellee to respond to the new argument.

If you are the appellee's counsel, and if you really want to annoy the judges, prepare your statement of facts as if the appellant's brief contained no facts. The judges keep reading, hoping to find something not contained in the appellant's brief, but soon discover it was all a waste of time. Do not be afraid to agree with the facts in the initial brief if they are correct and complete. You can always expand or emphasize facts in the argument section, particularly where there is more than one issue raised.

Should the appellee reword the issue? By all means, as long as it is an improvement and objectively done. Do not reword merely to slant in your favor a fairly worded issue. For clarity, always include the issue as worded by the appellant if you do reword it, and never change the order in which the issues are argued. In addition, where there are multiple issues, state them in full in the table of contents so that the reader can quickly locate the argument on a particular issue.

As for the conclusion—less is always more. Most conclusions are too long because the brief writer assumes another summary of argument is necessary at the end. What the court wants is the specific relief you seek, such as a new trial in which the spontaneous utterance is not admitted in evidence.

As a judge, I was usually able to figure out if a lawyer I knew to be a good brief writer had a strong position, by the clarity of her brief. Clarity is most important when you have the stronger position.

The following are things that make briefs easier to read:

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Never use references such as "appellant" and "appellee" or "Smith" and "Jones." The reader cannot be expected to remember a few pages into the brief that the appellant or Smith was the plaintiff. (One noted legal writing lecturer disagrees and would use "Smith" and "Jones," but he has never had to prepare to hear 20 oral arguments in one week.) It is different if one party is an individual and the other a corporation. "Smith" and "State Farm" are fairly easy to follow through a brief. "Jones" and "the State" in a criminal case are fine. "Mr. Jones," over and over again, is awkward. Just use "Jones." Anything that is not cumbersome and is clear to the reader will do.

Do not overuse subheadings. In a complicated appeal, with several unrelated issues, subheadings in the facts, as well as in the arguments, can be helpful, but usually there are too many. Use them liberally on early drafts, but weed out all but the necessary ones later.

Limit the use of dates. When the reader sees a date, he or she assumes it is for a reason. If there is no reason, omit the date. The date of the crime, however, is always necessary to determine which version of a statute or rule is applicable. The date of an accident should be included for the same reason, but other dates can probably be left out. Normally, the month and year are sufficient for necessary dates, unless there is a specific procedural time period issue. The time of trial could be important if there is an issue about the applicability of a new or modified standard jury instruction.

State the issues in full in the table of contents and before the statement of the case and facts. Your rules may not require this, but it helps the judge or clerk reading the brief for the first time to put the facts in perspective. As a judge, I would usually also read the summary of argument before reading the facts for the same reason.

The traditional view is that quotations from cases should be avoided. Two or three sentences quoted from an opinion, however, can save time for the judge who may not trust what counsel says about the case. This is also true for short portions of testimony, statutes, or contracts, particularly where you know the other side will question your version if you do not quote.

Never use words that any reader would have to look up in a dictionary. This includes a Latin term or a medical or scientific term. You do not want to cause the judges and law clerks to look away from your brief to look up an unfamiliar term. In addition, it may make them feel stupid, and you do not want to be the lawyer who did that. To this day, I do not know what "apodictic" means, because I either have never looked it up or forgot it if I did. But I do remember the lawyer who put it in a brief, and it is not a fond memory.

Avoid string citations. No more than one case is necessary for universally accepted principles such as the standard for granting a summary judgment.

Capitalize with care. Do not capitalize any words that would not be capitalized in a book or an article. If you must, it is all right to capitalize "court" such as in "this Court," but it isn't really necessary.

Footnotes should be avoided. In a brief at the page limit, more than a few footnotes can indicate to the court an end-run around the page-limit rule. An example of a proper use of a footnote would be to include a list of cases from other jurisdictions that are of tangential interest, but not relevant enough to include in the body of the brief. Use a lead-in sentence for the footnote so that the reader knows whether he or she wants to look down. Here is an example from a medical malpractice case in which the injury was blindness from birth, and the defendant was arguing in the last and weakest of four issues that the amount awarded was excessive: The appellee plaintiff included a footnote that contained a dozen cases with injuries other than blindness, and within parentheses after each case was the amount of damages affirmed and a description of the injury. The helpful lead-in sentence in the body of the brief, before the footnote, was: "Our research reveals no cases involving blindness from birth, but we have included below a number of cases with serious injuries in which awards in similar amounts were affirmed."

If your rules do not require or authorize an appendix, do not supply one without inquiring of the clerk's office. Some courts do not want them because of the storage room they take up, or the waste of paper. If your entire case hinges on a several-page release or contract, consider attaching a copy at the end of the brief.

Before giving the reader entirely new information, show its connection to information the reader already knows. When someone who can't tell a joke tries to do so and gets the facts out of order, the joke is ruined. So, for example, do not say in the facts that the defendant was observed on Elm Street in Brooklyn, driving a white Ford, at 6:30 p.m. on Tuesday, May 4, 2010, unless you have already told the reader why those facts matter. If none of them is relevant, leave all of them out. You are not writing a police report.

In the end, the most important thing about a brief is clarity. Remember, appellate judges are busy, usually over-worked, and almost certainly under-paid. Make their jobs easier and they may do the same for you.

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